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8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF WASHINGTON**

10  
11 NATIONAL SHOOTING ) NO. 2:23-cv-00113-MKD  
12 SPORTS FOUNDATION, INC., )  
13 )  
14 Plaintiff, ) **BRIEF OF LEGAL SCHOLARS**  
15 v. ) **AS AMICI CURIAE**  
16 )  
17 ROBERT W. FERGUSON, )  
18 Attorney General of the State of )  
19 Washington, )  
20 )  
21 Defendant. )  
22 )  
23 )  
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## INTEREST OF *AMICI CURIAE*

*Amici* are law professors with expertise in torts, statutory interpretation, constitutional law, and firearms litigation and regulation.<sup>1</sup> *Amici* hold a variety of views about gun control and the value of lawsuits against the gun industry. *Amici*’s interest is to assist the court in properly construing the Protection of Lawful Commerce in Arms Act (“PLCAA”), 15 U.S.C. §§ 7901-7903. PLCAA has generated confusion in the courts and has at times been mischaracterized—including by plaintiff National Shooting Sports Foundation (“NSSF”) in this case—in a manner inconsistent with its text and structure, and in plain contravention of core legal doctrines that *amici* teach and study.

No person or entity other than *amici* and their counsel authored this brief in whole or in part. No person or entity other than *amici* and their counsel contributed money intended to fund preparing or submitting this brief. *Amici* submit this brief with the consent of all parties.

## INTRODUCTION

Congress passed PLCAA in response to civil lawsuits seeking to hold firearms manufacturers and sellers liable for harm caused by unlawful third-party misuse of their products. These lawsuits, asserting various common law claims,

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<sup>1</sup> *Amici* submit this brief as individuals, not as representatives of their respective universities. The names of *amici* are listed in Appendix A, with institutional affiliations provided only for purposes of identification.

1 alleged that gun industry defendants failed to take reasonable precautions in the  
2 design, marketing, distribution, and sale of weapons, resulting in illegal gun  
3 trafficking and criminal shootings. To address concerns about such lawsuits,  
4 PLCAA delineates a class of lawsuits—referred to as “qualified civil liability  
5 actions,” 15 U.S.C. § 7902(a)—that federal and state courts may not hear.  
6 Importantly, PLCAA also specifies a class of lawsuits that courts may continue to  
7 hear. *Id.* § 7903(5)(A)(i)–(vi). Thus, PLCAA is not a complete bar to all lawsuits  
8 against firearms manufacturers and sellers for harm caused by unlawful third-party  
9 misuse of their products.  
10  
11

12           At issue in this case is PLCAA’s predicate exception, *id.*  
13 § 7903(5)(A)(iii). Under the predicate exception, PLCAA does not preempt “an  
14 action in which a manufacturer or seller . . . knowingly violated a State or Federal  
15 statute applicable to the sale or marketing of the product, and the violation was a  
16 proximate cause of the harm for which relief is sought.” *Id.* This provision is known  
17 as the “predicate exception” because it rests on a defendant’s violation of an  
18 underlying, or “predicate,” statute.  
19  
20

21           Part I of the following discussion demonstrates that SB 5078 is  
22 unambiguously a predicate statute according to the plain text of PLCAA’s predicate  
23 exception. Part II then establishes that liability for violation of SB 5078 under the  
24 predicate exception would be entirely consistent with PLCAA’s overall structure.  
25 Finally, Part III exposes the fundamental flaws in the NSSF’s several attempts to  
26 convince the court that the predicate exception does not mean what it plainly says.  
27  
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**I. SB 5078 May Serve as a Predicate Statute Because it is “Applicable to the Sale and Marketing” of a Firearm Product as that Phrase is Defined by PLCAA**

Under PLCAA’s predicate exception, a court may hear “an action in which a manufacturer or seller of a [firearm] product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought.” 15 U.S.C. § 7903(5)(A)(iii). Thus, for a lawsuit to qualify under the predicate exception, it must meet two requirements. First, it must rely on a predicate statute. Second, it must allege that a firearms manufacturer or seller knowingly violated the predicate statute and that such violation proximately caused harm.

SB 5078 requires firearms industry members to “establish, implement, and enforce reasonable controls regarding [the] manufacture, sale, distribution, importing, use, and marketing of firearm industry products.” SB 5078 § 2(4). SB 5078 explicitly, specifically, and unambiguously applies to the sale and marketing of firearms products. SB 5078 therefore qualifies as a predicate statute. A lawsuit that alleges a knowing violation of SB 5078 that proximately caused harm thus falls within the predicate exception.

**II. Liability for Violation of SB 5078 under the Predicate Exception Is Entirely Consistent with PLCAA’s Structure**

PLCAA does not operate as an absolute liability shield for the firearms industry but rather carefully circumscribes the jurisdiction of federal and state courts to hear only certain claims against firearms industry defendants for harms resulting from third-party unlawful misuse of firearms products. Three

1 constitutional principles inform the scope of claims that PLCAA permits: the  
2 individual right to keep and bear arms, separation of powers, and federalism.  
3 Congress explicitly endorsed these principles in PLCAA’s legislative findings and  
4 statement of purpose.<sup>2</sup> 15 U.S.C. § 7901(a), (b). By interpreting the predicate  
5 exception in light of these structural principles, it is clear that SB 5078 is precisely  
6 the type of statute that PLCAA permits and anticipates that states will enact.  
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12 <sup>2</sup> *Amici* recognize that prefatory material cannot trump the plain meaning of the  
13 predicate exception. However, in this case, the prefatory material is in complete  
14 accord with the plain meaning of the predicate exception. *Amici* demonstrate a  
15 congruent relationship between the prefatory material and the text of the operative  
16 provisions, including the predicate exception. Thus, both a narrow focus on the  
17 text of the predicate exception and attention to PLCAA’s prefatory material  
18 compel the conclusion that a lawsuit alleging a violation of SB 5078 could satisfy  
19 the predicate exception. *See Confederated Tribes & Bands of Yakama Nation v.*  
20 *Yakima Cnty.*, 963 F.3d 982, 990 (9th Cir. 2020) (the determination of “whether  
21 [] language at issue has a plain and unambiguous meaning” is made by referring  
22 to the “language itself, the specific context in which that language is used, and the  
23 broader context” of the statute or agreement) (internal citation omitted).  
24  
25  
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1           A.     *PLCAA's Explicit Commitment to Protecting Second Amendment*  
2                     *Rights Is Expressed in the Predicate Exception's Knowledge and*  
3                     *Proximate Causation Requirements*

4           PLCAA's legislative findings and stated purposes affirm PLCAA's  
5 explicit commitment to the individual right to keep and bear arms under the Second  
6 Amendment. 15 U.S.C. § 7901(a)(1), (2), (6), (b)(2). To protect the individual right  
7 of citizens to keep and bear arms, PLCAA preempts litigation against the firearms  
8 industry that could restrict the availability of firearms in the lawful, civilian market.  
9 Accordingly, the predicate exception imposes two jurisdictional requirements on  
10 permissible claims against the industry that limit litigation. First, it imposes a  
11 heightened mental state requirement that any actionable violation be made  
12 "knowingly." This limits litigation to allegations of deliberate industry misconduct  
13 while protecting firearms manufacturers and sellers from lawsuits based on  
14 unwitting negligence. Thus, the predicate exception's knowledge requirement  
15 exposes bad actors within the industry to possible lawsuits while protecting law  
16 abiding manufacturers and sellers who make honest mistakes.  
17

18           Second, the predicate exception imposes a proximate cause  
19 requirement. This limits litigation to allegations that a manufacturer or seller  
20 actively facilitated the unlawful misuse of its products while shielding the industry  
21 from vicarious liability for harms caused *solely* by the illegal misconduct of others.  
22 The proximate cause requirement thereby holds gun manufacturers and sellers  
23 accountable for enabling criminal activity while protecting them from guilt by  
24 association.  
25  
26  
27  
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1           Lawsuits alleging knowing violation of SB 5078 that proximately  
 2 caused harm would fall squarely within the scope of permissible claims allowed by  
 3 the predicate exception. As such, they would be entirely consistent with PLCAA's  
 4 commitment to defending the individual right of citizens to keep and bear arms by  
 5 shielding the gun industry from claims based on unwitting negligence and vicarious  
 6 liability.  
 7

8           *B. PLCAA's Explicit Commitment to Separation of Powers is Expressed*  
 9           *in the Predicate Exception's Distinction Between Legislatively*  
 10           *Created Causes of Action, Which May Serve as the Basis for a*  
 11           *Lawsuit Against the Industry, and Judge-Made Causes of Action,*  
 12           *Which May Not*

13           PLCAA is a tort reform statute. A defining characteristic of tort reform  
 14 is the preemption of state common law causes of action by alternative statutory  
 15 liability rules. This represents a specific vision of the Constitution's separation of  
 16 powers among different branches of government. Those who espouse this vision  
 17 deem courts to encroach on legislative supremacy in the policymaking realm when  
 18 courts adopt new theories of recovery while acting in their common law capacity.  
 19

20           To uphold the conception of separation of powers endorsed by the  
 21 statute's findings and purposes, 15 U.S.C. § 7901(a)(7)-(8), PLCAA preempts  
 22 lawsuits against the industry that rely on common law (i.e., judicially created)  
 23 liability and insists that legislatures maintain exclusive authority over the creation  
 24 of legal duties related to the manufacture and sale of firearms. Accordingly, the  
 25 predicate exception permits lawsuits against the gun industry for harms resulting  
 26 from the unlawful third-party misuse of firearms products only where, as here, such  
 27 lawsuits are based on the violation of statutes.  
 28

1           C.     *PLCAA’s Explicit Commitment to Federalism is Expressed in the*  
 2                 *Predicate Exception’s Invitation to State Legislatures to Enact*  
 3                 *Statutes that Impose Obligations and Prohibitions on the Firearms*  
 4                 *Industry*

5                 PLCAA’s commitment to the constitutional principle of federalism is  
 6     explicit in its stated purpose “[t]o preserve and protect the Separation of Powers  
 7     doctrine and important principles of federalism, State sovereignty and comity  
 8     between the sister States.” 15 U.S.C. § 7901(b)(6). PLCAA honors this  
 9     commitment to federalism by preserving the ability of states to regulate the industry  
 10    in accordance with regional variation in attitudes about gun ownership and  
 11    responses to firearms-related violence that account for state-specific concerns and  
 12    priorities. Accordingly, the predicate exception allows not only federal but also  
 13    state statutes to serve as predicate statutes. The plain meaning of the predicate  
 14    exception’s text makes clear that PLCAA preemption does not cover “an action in  
 15    which a manufacturer or seller of a qualified product knowingly violated a *State* or  
 16    Federal statute applicable to the sale or marketing of the product. . . .” *Id.*  
 17    § 7903(5)(A)(iii) (emphasis added).

18           **III. The NSSF’s Idiosyncratic Definition of a Predicate Statute Contradicts**  
 19           **the Plain Meaning of the Predicate Exception and Its Statutory**  
 20           **Context**

21                 The NSSF defines a predicate statute in terms that do not appear in  
 22     any PLCAA provision and that depart from the plain meaning of the predicate  
 23     exception. According to the NSSF, the predicate exception exempts “only actions  
 24     predicated on laws that impose concrete obligations or prohibitions that industry  
 25     members can actually knowingly violate, not laws that merely impose general  
 26     members can actually knowingly violate, not laws that merely impose general  
 27     members can actually knowingly violate, not laws that merely impose general  
 28     members can actually knowingly violate, not laws that merely impose general

1 duties of care.” ECF No. 17 at 11. The NSSF argues that, under this definition, SB  
2 5078 cannot serve as a predicate statute because it imposes a general duty of care  
3 on firearms industry members to establish “reasonable controls” to prevent third-  
4 party criminal misuse of its products. *Id.* at 14. The NSSF offers three versions of  
5 this argument. In each one, the NSSF insists that “context” requires an  
6 interpretation of the predicate exception contrary to its plain meaning. However,  
7 the context that the NSSF cites supports the plain meaning, not the NSSF’s  
8 idiosyncratic definition. Moreover, the NSSF’s analysis relies on selective reading,  
9 mischaracterizations, and distortions of well-established legal doctrine.  
10  
11

12 As a preliminary matter, the NSSF repeatedly cites the Ninth Circuit’s  
13 opinion in *Ileto v. Glock* as authority for its restrictive interpretation of the predicate  
14 exception. *Id.* at 11, 13, 15, 16; Compl. ¶ 52 (citing *Ileto v. Glock*, 565 F.3d 1126,  
15 1134 (9th Cir. 2009)). In every instance, the NSSF mischaracterizes *Ileto*’s holding.  
16

17 *Ileto* addressed whether California’s codified tort law can serve as a  
18 predicate statute under the predicate exception. In that case, the firearms industry  
19 defendants argued that “the requirements of the predicate exception would be met  
20 only if a plaintiff alleged a knowing violation of a statute that pertained *exclusively*  
21 to the sale or marketing of firearms.” 565 F.3d at 1134; *see also id.* at 1133  
22 (“Defendants counter that only a separate statute, regulating firearms exclusively  
23 (or at least explicitly), can be a predicate statute.”). The Ninth Circuit agreed with  
24 the defendants, concluding that only “statutes that regulate manufacturing,  
25 importing, selling, marketing, and using firearms or that regulate the firearms  
26 industry,” are predicate statutes. *Id.* at 1136. SB 5078 plainly fits that description.  
27  
28

1 Nowhere did the *Ileto* court adopt the NSSF’s restrictive interpretation of the  
2 predicate exception to exclude predicate statutes that impose duties of care or that  
3 make no reference to knowing violation or proximate cause.  
4

5 *A. General Standards of Reasonable Care are Susceptible to Knowing*  
6 *Violation*

7 The NSSF argues that the predicate exception requires knowing  
8 violation, so, by inference, predicate statutes must impose “some requirement or  
9 obligation sufficiently concrete that an industry member can actually knowingly  
10 violate it at the time of manufacture or sale.” ECF No. 17 at 12. According to the  
11 NSSF, “duties of care” are not susceptible to knowing violation and, therefore,  
12 statutes such as SB 5078 that require reasonable controls cannot serve as predicate  
13 statutes. This argument incorrectly assumes that standards of reasonable care are  
14 not susceptible to knowing violation.  
15

16 Knowledge is a mental state. Reasonable care is a standard of conduct.  
17 Conceptually, these are fully compatible with one another. That is, it makes perfect  
18 sense to assert that a person knowingly failed to exercise reasonable care. For  
19 example, a firearms seller knowingly fails to exercise reasonable care if the seller  
20 knows of reasonable precautions that would reduce the risk of illegal trafficking,  
21 unlawful misuse, or inventory theft but deliberately refrains from taking such  
22 precautions.  
23

24 That a reasonable standard of care can be knowingly violated is a  
25 matter of hornbook tort law. Dobbs’ LAW OF TORTS, the leading treatise on  
26 American tort law, offers the examples of driving while intoxicated and drag racing  
27  
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1 on a public highway as illustrative circumstances where a defendant is liable for  
 2 activity that s/he knows creates an unreasonable risk of harm to others. Dan B.  
 3 Dobbs, Paul T. Hayden and Ellen M. Bublick, THE LAW OF TORTS §§ 32, 140 (2d  
 4 ed.) (“Dobbs”) (citations omitted).<sup>3</sup>

5  
 6 Thus, the NSSF’s assertion that standards of conduct based on  
 7 reasonable care are not susceptible to knowing violation is thus conceptually wrong  
 8 and doctrinally unfounded.

9  
 10 *B. The Examples in the Predicate Exception Explicitly Encompass*  
 11 *Predicate Statutes that Impose Duties of Care*

12 The predicate exception includes examples. 15 U.S.C. §  
 13 7903(5)(A)(iii)(I) & (II). The NSSF asserts that the predicate statutes in these  
 14 examples impose “concrete obligation[] [and] prohibition[s].” ECF No. 17 at 13.  
 15 Thus, the NSSF infers, the phrase “applicable to the sale and marketing of a  
 16

17 \_\_\_\_\_  
 18 <sup>3</sup> Indeed, the well-established doctrinal concept of recklessness in torts, by  
 19 definition, combines the mental state of knowledge with the standard of conduct  
 20 of reasonable care. According to Dobbs: “In civil cases, courts find conduct to be  
 21 reckless, willful or wanton when two elements concur. First, the conduct must not  
 22 only create an unreasonable risk of harm to others; it must create a high degree of  
 23 risk or a risk of very serious harm, or, if a lesser risk or less probable risk, then  
 24 one that is easily avoided. Second, the defendant must be conscious of the risk  
 25 and proceed without concern for the safety of others.” Dobbs § 32.  
 26  
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1 [firearm] product” must be read, contrary to its plain meaning, to encompass only  
2 statutes that impose “concrete obligations and prohibitions.” *Id.* at 13-14. Under  
3 this restrictive reading, SB 5078, which imposes a duty of care, cannot serve as a  
4 predicate statute. This argument mischaracterizes the predicate exception’s  
5 examples.  
6

7           The predicate exception’s examples of actionable claims illustrate a  
8 category of statutory standards into which SB 5078’s reasonable controls standard  
9 fits comfortably. The examples include liability for failure to take a required action,  
10 such as the failure to make an appropriate entry in a record required for the transfer  
11 of a firearm, 15 U.S.C. § 7903(5)(A)(iii)(I), and liability for engaging in any  
12 conduct that facilitates a third party’s illegal conduct, such as aiding and abetting  
13 the transfer of a firearm to a legally ineligible person, *id.* § 7903(5)(A)(iii)(II). In  
14 both cases, liability only attaches when the gun industry actor knowingly fails to  
15 take the required action or knowingly facilitates an illegal transfer. Just as with the  
16 category of statutory standards illustrated by these examples, under the predicate  
17 exception, SB 5078 would impose liability on a gun industry member who  
18 knowingly fails to establish reasonable controls and thereby knowingly facilitates  
19 the illegal transfer of firearms through illegal sales or inventory theft. SB 5078  
20 § 2(1)(f)(i) & (ii).  
21

22           Thus, SB 5078’s requirement of reasonable controls to avoid  
23 facilitating illegal gun transfers by others fits comfortably within the category of  
24 statutory standards illustrated by the examples in the predicate exception.  
25  
26  
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28

1           C.     *PLCAA’s Other Exceptions Include Duties of Reasonable Care*

2           The NSSF asserts that all five of PLCAA’s other exceptions “are  
3 limited to circumstances in which the manufacturer or seller itself engaged in some  
4 well-defined type of wrongful conduct, such as claims for design or manufacturing  
5 defect, fraudulent transfer, negligent entrustment, or breach of contract or  
6 warranty.” Compl. ¶ 17 (citing 15 U.S.C. § 7903(5)(A)(i)-(vi)). The NSSF infers  
7 from these other exceptions that the predicate exception is also limited to statutes  
8 that prohibit specific conduct. According to this argument, since SB 5078 requires  
9 reasonable controls, it cannot serve as a predicate statute. *Id.*

12           This argument fails because several of the exceptions cited by the  
13 NSSF do, in fact, rely on reasonable care standards rather than a “well-defined type  
14 of wrongful conduct.” The exception for design defect, 15 U.S.C. § 7903(5)(A)(v),  
15 imposes a duty on firearms manufacturers to adopt a reasonable alternative design  
16 if such an alternative is feasible. Dobbs § 458 (“In many and perhaps most design  
17 defect cases, the plaintiff will have to prove that a safer, *reasonable* alternative  
18 design was available to the defendant, and that the failure to adopt that design  
19 would have prevented the plaintiff’s harm from occurring.”) (emphasis added); *see*  
20 *also* Restatement (Third) of Torts: Prod. Liab. § 2 (1998). The exception for  
21 negligent entrustment, 15 U.S.C. § 7903(5)(A)(ii), imposes a duty on firearms  
22 sellers to exercise reasonable care to discern whether a purchaser “is likely to ...  
23 use the product in a manner involving unreasonable risk of physical injury to the  
24 person or others.” *Id.* § 7903(5)(B); Dobbs § 422 (“duty to use reasonable care to  
25 control permissive users to prevent them from negligently or intentionally inflicting  
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1 harm . . . is closely related to the owner’s responsibility for negligent entrustment  
2 of chattels to people who foreseeably might use the chattel in a way dangerous to  
3 themselves”). The exception for breach of warranty, 15 U.S.C. § 7903(5)(iv),  
4 imposes a duty on a firearms manufacturer—in the case of an implied warranty of  
5 merchantability—to conform its representations concerning a product to the  
6 common practices of the industry. U.C.C. § 2-314(3) (“implied warranties may  
7 arise from course of dealing or usage of trade”).  
8

9  
10 In each of these exceptions, PLCAA imposes a general duty on  
11 firearms manufacturers to exercise reasonable care with regard to an identifiable  
12 risk, rather than imposing specific design, manufacturing, or sales parameters.  
13 Design defect doctrine does not specify the design that the defendant-manufacturer  
14 should have adopted. Negligent entrustment doctrine does not specify what  
15 measures a seller should have taken to discern the level of risk posed by the  
16 purchaser. Implied warranty of merchantability doctrine does not specify what the  
17 industry custom requires. Similarly, SB 5078 does not specify the specific controls  
18 a firearms industry member must establish to prevent the risk of illegal sale of its  
19 products (SB 5078 § (2)(f)(i)), or inventory theft or loss (SB 5078 § (2)(f)(ii)).  
20  
21 Thus, contrary to the NSSF’s argument, the context provided by PLCAA’s  
22 exceptions suggests that the PLCAA does not limit firearms industry liability to  
23 prohibitions of a “well-defined type of wrongful conduct.”  
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**CONCLUSION**

For the foregoing reasons, this Court should deny the NSSF's motion for a preliminary injunction.

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